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No. 02-102

In the
Supreme Court of the United States

John Geddes LAWRENCE
and Tyron Garner,
Petitioners,

v.

State of TEXAS,
Respondent.

On Writ of Certiorari to the Fourteenth Court of Appeals of Texas

BRIEF OF THE STATES OF ALABAMA, SOUTH CAROLINA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Does the United States Constitution protect the right to engage in homosexual sodomy?

2. Does the United States Constitution forbid the States to make legal classifications based on a person's choice to engage in sexual activity with another person of the same sex?

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INTEREST OF *AMICI CURIAE*

The States of Alabama, South Carolina, and Utah submit this brief as *amici curiae* in support of the respondent State of Texas, urging this Court to affirm the judgment of the Texas Court of Appeals and not to recognize homosexual sodomy as a fundamental constitutional right or as a suspect classification under the Equal Protection Clause.

Presently, some fourteen States, including *amici*, have criminal statutes prohibiting either homosexual sodomy alone or all extramarital sodomy. Many States also discourage homosexual activity through policies regarding, for example, same-sex marriage, child custody, adoption, and foster parenting. And many States have laws that regulate other kinds of private consensual adult sexual activity, such as polygamy, incest, pedophilia, prostitution, and adultery. *Amici* are concerned that, if this Court should adopt petitioners' expansive and undisciplined interpretation of the Constitution, many if not all of these laws will be invalidated.

Petitioners' interpretation of the Constitution would limit the ability of the States to express and preserve the moral standards of their communities. Under the Constitution, the States should be free to legislate in such sensitive areas as family definition, child-rearing, and sexual conduct. Absent a mandate in the text or history of the Constitution, it is not for the federal courts to decide what is right and what is wrong for all 50 States in the Union. The people, not the courts, should decide such fundamental issues for themselves.

SUMMARY OF ARGUMENT

Petitioners invite this Court to exalt will above reason and political correctness above the text and history of the United States Constitution. They would have this Court not only overrule *Bowers v. Hardwick*, which explicitly rejected their arguments, but also scuttle the teaching of numerous cases limiting the recognition of non-textual constitutional rights to those that have historically and traditionally been considered beyond the proper scope of governmental regulation. They ask this Court to interpret the Constitution according to their political wishes, not according to the rule of law.

Engaging in homosexual sodomy is not protected by the Due Process Clause of the Fourteenth Amendment or by any other provision of the Constitution. Nor is the *choice* to engage in homosexual sodomy (as opposed to the *inclination*) a suspect classification subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The legal regime that petitioners and their *amici* advocate is a creature of their imagination, one that would not have been seriously entertained by the legal establishment a mere forty years ago. Times may have changed, but the Constitution that this Court is sworn to apply in its exercise of judicial review has not. This Court should not bend the text and history of the Constitution to facilitate perceived changes in social mores that may turn out to be illusory or misguided.

The proper loci for change of the nature that petitioners and their *amici* advocate are the legislatures of the 50 States. The legislatures of the States are the bodies of government most responsive to the will of the people and best suited to forge the practical compromises necessary to preserve unity in a

rapidly changing and pluralistic society. They are best able to determine what works, and what does not, and to respond to that learning appropriately. The courts, which must apply rules, heed precedents, and decide only the cases in front of them, are ill-suited for these functions. This Court, which must make one rule for the entire Nation, is particularly ill-suited for these functions.

In short, the States should remain free to protect the moral standards of their communities through legislation that prohibits homosexual sodomy. If legislation of such activity is no longer supported by a majority of the citizens of the States, the legislatures of the States will repeal them, or elected executive officials will cease to enforce them. The recent movement toward decriminalizing homosexual sodomy, even with *Bowers v. Hardwick* on the books, shows that the legislative system is quite able to respond to popular will without judicial prodding. Impatience with the pace of change, or with the resistance of citizens who do not regard the change as beneficial, does not justify the judicial creation of a new constitutional right.

ARGUMENT

Petitioners attack Texas's homosexual sodomy statute on two fronts. First, they claim a substantive right, under the Due Process Clause of the Fourteenth Amendment, to engage in the conduct prohibited by the statute. Second, they claim that, even if Texas may constitutionally prohibit sodomy, it may not prohibit homosexual sodomy, while permitting heterosexual sodomy, without violating the Equal Protection Clause of the Fourteenth Amendment. Neither argument withstands analysis.

I. The Constitution Does Not Contain an Express or Implied Right to Engage in Homosexual Sodomy.

The text of the Constitution contains no mention of a right to engage in homosexual sodomy. The only question, then, is whether homosexual sodomy is a right "implicit in the concept of ordered liberty"[1] — *i.e.*, a right "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and therefore protected by the Due Process Clause of the Fourteenth Amendment.[2] To answer that question, "[w]e begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."[3] Because homosexual sodomy has not historically been recognized in this country as a right — to the contrary, it has historically been recognized as a wrong — it is not a fundamental right.

A. Only activities historically considered beyond the reach of government regulation are protected by the Due Process Clause of the Fourteenth Amendment.

"[B]ecause guideposts for responsible decision-making in this unchartered area are scarce and open-ended," this Court "ha[s] always been reluctant to expand the concept of substantive due process" to recognize new fundamental rights.[4] "By extending

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[1] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

[2] *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

[3] *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

[4] *Id.* at 720 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."[5] This Court has therefore cautioned that it will "'exercise the utmost care whenever [it is] asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[6] "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[7]

Thus, to qualify as a fundamental right, the right in question must meet two conditions. First, it must be "deeply rooted in this Nation's history and tradition."[8] Second, it must be given "careful description," to ensure that it remains within the history and tradition that justifies its recognition in the first place.[9] One cannot argue that liberty itself is fundamental and therefore that all private activity is protected from state interference by the Constitution. In *Washington v. Glucksberg*, for instance, this Court refused to accept respondent's formulation of the issue as whether the Due Process Clause protects "basic and intimate exercises of personal autonomy."[10] Rather, the Court framed the question as "whether the protections of the

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[5] *Id.*

[6] *Id.* (quoting *Collins*, 503 U.S. at 125).

[7] *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

[8] *Glucksberg*, 521 U.S. at 721 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

[9] *Id.* (citations omitted).

[10] 521 U.S. at 724.

Due Process Clause include a right to commit suicide with another's assistance," [11] and answered the question in the negative.

All of this Court's precedents analyzing the existence of non-textual constitutional rights evince a strong concern with the historical pedigree of the specific right in question. In *Meyer v. Nebraska*,[12] this Court premised its recognition of the non-textual right of parents to school their children privately on the long-standing importance of family child-rearing to the health and structure of American society.[13] And in *Moore v. City of East Cleveland*,[14] the Court struck down a city housing ordinance that forbade a grandmother from living in the same home with her son and two grandsons under the Due Process Clause because it violated the sanctity of the family. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." [15] This interpretational approach prevented the Court from having to draw "arbitrary lines" in the recognition of fundamental rights, by showing "careful 'respect for the teachings of history

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[11] *Id. See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973) ("Nothing [] in this Court's decisions intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation").

[12] 262 U.S. 390 (1923).

[13] *Id.* at 400-02.

[14] 431 U.S. 494 (1977).

[15] *Id.* at 503 (plurality opinion).

[and] solid recognition of the basic values that underlie our society.'"[16]

In *Griswold v. Connecticut*,[17] this Court recognized a non-textual right to use contraceptives based on the historical right to marital privacy, "a right of privacy older than the Bill of Rights — older than our political parties, older than our school system."[18] "Marriage," said the Court, "is a coming together for better or for worse, hopefully enduring, and intimate *to the degree of being sacred*." [19] In a concurring opinion, Justice Goldberg, Chief Justice Warren, and Justice Brennan insisted that non-textual fundamental rights like the one recognized in *Griswold* must derive from the "'traditions and [collective] conscience of our people."[20] On similar thinking, this Court has accorded constitutional protection to the choice of unmarried persons whether to bear children.[21]

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[16] *Id.* at 502-03 (plurality opinion) (quoting *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)).

[17] 381 U.S. 479 (1965).

[18] *Id.* at 486.

[19] *Id.* (emphasis added).

[20] *Id.* at 493.

[21] *Carey v. Population Services International*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget a child . . . holds a particularly important place in the history of the right of privacy"); *Roe v. Wade*, 410 U.S. 113, 129 (1973) (recognizing non-textual right to abortion after conducting extensive survey of medical and legal history of abortion and concluding that restrictive criminal abortion statutes were "of relatively recent vintage"); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (extending *Griswold* to unmarried persons based on Equal Protection Clause).

Most recently, in *Washington v. Glucksberg*,[22] this Court denied the existence of a non-textual right to assisted suicide based on the long history of laws prohibiting suicide and assisted suicide.[23] "[W]e are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults."[24] The Court concluded that, while changes had occurred over time, especially in laws prohibiting or penalizing suicide itself, "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[25]

"Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause."[26] Without the constraint and guidance of history, judges would be free to legislate their own preferences at the expense of those of the American people as expressed through their elected representatives. Reference to history is the only disciplined means of recognizing a non-textual constitutional right.

B. The non-textual fundamental rights that this Court has recognized in the Due Process Clause of the Fourteenth

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[22] 521 U.S. 702 (1997).

[23] *Id.* at 720.

[24] *Id.* at 723.

[25] *Id.* at 728.

[26] *Glucksberg*, 521 U.S. at 721 (quoting *Collins*, 503 U.S. at 125).

Amendment have protected marriage, child-bearing, and the family — not extramarital sex, and certainly not homosexual sodomy.

In keeping with the historical analysis described above, this Court has primarily limited its recognition of non-textual fundamental rights in the Due Process Clause of the Fourteenth Amendment to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[27] In 1997, this Court cataloged the list as follows:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specifically protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); and to abortion, [*Planned Parenthood v. Casey*, 505 U.S. 833 (1992)].[28]

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[27] *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *Paul v. Davis*, 424 U.S. 693, 713 (1976) (same); *Population Services*, 431 U.S. at 684-85 (same).

[28] *Glucksberg*, 521 U.S. at 720.

"The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."[29]

The fundamental role of marriage and family in our society has been recognized on many occasions by the Court. In *Zablocki v. Redhail*,[30] the Court invalidated a Wisconsin statute requiring certain persons to obtain a court order before marrying:

> [T]he right to marry is of fundamental importance for all individuals. Long ago in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court characterized marriage as "the most important relation in life," *id.*, at 205, and as "the foundation of the family and of society, without which there would be neither civilization nor progress," *id.*, at 211. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court recognized that the right "to marry, establish a home, and bring up children" is a central part of the liberty protected by the Due Process Clause, *id.*, at 399, and in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), marriage was described as "fundamental to the very existence and survival of the race," 316 U.S. at 541.[31]

The Court went on to conclude that the right to marry is one of the "matters of family life" protected by the

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[29] *Griswold*, 381 U.S. at 495 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

[30] 434 U.S. 374 (1978).

[31] *Id.* at 384.

right of privacy implicit in the Due Process Clause.[32] In *Moore v. City of East Cleveland*, the Court also dwelt on the historical role of marriage and the family in American society: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[33]

This Court has never recognized a fundamental right to engage in sexual activity outside of monogamous heterosexual marriage, let alone to engage in homosexual sodomy. Such a right would be antithetical to the "traditional relation of the family" that is "as old and as fundamental as our entire civilization."[34] Even the amorphous "right to privacy" recognized in *Griswold* and expanded upon in *Roe v. Wade* was never intended to include a right to have sex with whomever and however one pleased. In *Roe v. Wade*, this Court stated that the Due Process Clause does not include "an unlimited right to do with one's body as one pleases."[35] Twenty-five years later, in *Washington v. Glucksberg*, this Court again rejected the proposition that "all important, intimate, and personal decisions" are protected by the Due Process Clause.[36]

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[32] *Id.* at 386.

[33] 431 U.S. at 503 (plurality opinion). *See also Cleveland Board of Education v. LeFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment").

[34] *Griswold*, 381 U.S. at 496 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

[35] 410 U.S. at 154.

[36] 521 U.S. at 727-28.

In his *Poe v. Ullman*[37] dissent, which foreshadowed the recognition of the marital right of privacy in *Griswold v. Connecticut*, Justice Harlan said that homosexual activity, even when "concealed in the home," was a proper matter of state concern and could be forbidden by the States:

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized time has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine must be built upon that basis.[38]

Not only did Justice Harlan find no fundamental right to homosexual activity, he found a fundamental "pattern . . . deeply pressed into the substance of our social life" against such practice. Later in his

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[37] 367 U.S. 497 (1961).

[38] 367 U.S. at 545-46 (Harlan, J., dissenting).

dissenting opinion, Justice Harlan repeated his position "that adultery, homosexuality, fornication, and incest . . . however privately practiced" are subject to state proscription.[39] Subsequently, in *Griswold v. Connecticut*, Justice Goldberg wrote a concurring opinion, joined by Chief Justice Warren and Justice Brennan, in which he quoted with favor the passage from Justice Harlan's *Poe v. Ullman* dissent stating that "homosexuality and the like are sexual intimacies which the State forbids."[40] Justice Goldberg emphasized that the Court's holding in *Griswold* "in no way interfere[d] with a State's proper regulation of sexual promiscuity or misconduct."[41]

Most importantly, in *Bowers v. Hardwick*,[42] this Court squarely rejected the proposition that homosexual sodomy was a fundamental right. In so ruling, the Court resisted the temptation to decide whether laws forbidding homosexual sodomy were "wise or desirable" or whether they suited "the Justices' own choice of values."[43] Instead, the Court examined the long history of such laws, acknowledged the "limits of [its] role," and proclaimed itself "quite unwilling" to announce "a fundamental right to engage in homosexual sodomy."[44] *Hardwick* affirmed the Court's

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[39] *Id.* at 552-53.

[40] 381 U.S. at 499 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

[41] *Id.* at 498-99 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

[42] 478 U.S. 186 (1986).

[43] *Id.* at 190, 191.

[44] *Id.*

earlier ruling in *Rose v. Locke*[45] that a Tennessee sodomy statute did not implicate fundamental rights.[46]

"Proscriptions against [sodomy] have ancient roots."[47] "Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights."[48] In 1868, when the Fourteenth Amendment was ratified, 32 of the 37 States in the Union had laws criminalizing sodomy. By 1960, all 50 States had outlawed sodomy. As of 1986, when the Court decided *Bowers v. Hardwick*, 24 States still had anti-sodomy statutes.[49] Today, 14 states, including *amici*, have laws proscribing sodomy.[50]

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[45] 423 U.S. 48 (1975).

[46] *Id.* at 50 n. 3 ("This is not a case in which the statute threatens a fundamental right such as freedom of speech so as to call for any special judicial scrutiny"). *See also Doe v. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199 (D. Va. 1975) (three-judge panel) (upholding Virginia's anti-sodomy statute against claims that it violated due process, right to privacy, and freedom of expression), *aff'd*, 425 U.S. 901 (1976).

[47] 478 U.S. at 193-95 (citing Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986)).

[48] *Id.*

[49] *Id.* (citing Survey, 40 U. Miami L. Rev. at 524 n. 9).

[50] Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; Kan. Stat. Ann. § 21-3505(a)(1); La. Rev. Stat. Ann. § 14.89; Mich. Comp. Laws § 750.158, 338 (1991); Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; Mo. Rev. Stat. § 566.090; Okla. Stat. tit. 21, § 886; S.C. Code Ann. § 16-15-120; Tex. Pen. Code §§ 21.01(1), 21.06; Utah Code Ann. § 76-5-403(1); Va. Code Ann. § 18.2-361(a). In *Michigan Org. for Human Rights v. Kelley*, No. 88-815820 CZ (Mich. Cir. Ct. Wayne County, July 9, 1990), the Wayne County Circuit Court held the Michigan state sodomy statute unconstitutional. However, in *People v. Lino*, 447 Mich. 567, 573 (1994), the Michigan Supreme Court upheld the state sodomy statute but did not address whether it could constitutionally be applied to consenting adults.

"Against this background," the Court concluded in *Hardwick*, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[51] In a concurring opinion, Chief Justice Burger noted that homosexual sodomy had been forbidden in ancient Rome and by British common law.[52] Thus, "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[53] Justice Powell echoed Justice Burger's analysis: "I cannot say that conduct condemned for hundreds of years has now become a fundamental right."[54]

The Court in *Hardwick* also rejected the fallacious proposition that private adult conduct occurring in the home is, because of its location, protected as a fundamental right. The Court observed that, in *Stanley v. Georgia*,[55] it had held that a person did not have a right to possess and read obscene material in the privacy of his home. The right claimed in *Stanley* bore some connection to the text of the Constitution, namely the First Amendment, whereas the right to

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[51] *Hardwick*, 478 U.S. at 194 (Burger, C.J., concurring).

[52] *Id.* at 196 (Burger, C.J., concurring). *See also Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (observing "the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries").

[53] *Hardwick*, 478 U.S. at 197 (Burger, C.J., concurring).

[54] *Id.* at 198 n. 2 (Powell, J. concurring).

[55] 394 U.S. 557 (1969).

homosexual sodomy "ha[d] no similar support in the text of the Constitution" or "prevailing principles for construing the Fourteenth Amendment."[56] *A fortiori*, this Court held that there was no fundamental right to engage in homosexual sodomy just because it is done behind closed doors. "Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home."[57]

II. The Choice to Engage in Homosexual Sodomy (As Opposed to the Inclination) Is Not a Suspect Classification Under The Equal Protection Clause of the Fourteenth Amendment.

Almost all state action draws lines or classifies in some fashion. Inevitably, some persons or behaviors are disfavored.[58] The Equal Protection Clause does not prohibit all discrimination, just discrimination on the basis of certain suspect classifications.

If a statute does not discriminate on the basis of a suspect classification, it is subject only to rational basis review. This standard is used to evaluate "most forms of state action" [59] and is "the most deferential of standards" of review.[60] For a state-drawn classification to have a rational basis, it "must be reasonable, not

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[56] *Hardwick*, 478 U.S. at 194-95.

[57] *Id.* at 195.

[58] *Romer v. Evans*, 517 U.S. 620, 631 (1996) (recognizing "the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons").

[59] *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

[60] *Romer v. Evans*, 517 U.S. at 632.

arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[61] A law does not fail the rationality test merely if it "seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." [62]

Texas's statute prohibiting homosexual sodomy easily survives rational basis review. Texas is hardly alone in concluding that homosexual sodomy may have severe physical, emotional, psychological, and spiritual consequences, which do not necessarily attend heterosexual sodomy, and from which Texas's citizens need to be protected. Texas's conclusion, which is shared by other States, is certainly open to debate, but a statute does not become irrational for purposes of equal protection review just because some may hotly disagree with it.

In *Bowers v. Hardwick*, the Court did not review the Georgia anti-sodomy statute under the Equal Protection Clause.[63] Nevertheless, and of significance for the present case, the Court ruled that the statute survived rational basis review under the Due Process Clause, due to "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[64] The Court rejected the argument, also made in the present case, that the moral standards of the majority are "an inadequate

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[61] *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

[62] *Romer v. Evans*, 517 U.S. at 632.

[63] 478 U.S. at 196 n. 8.

[64] *Id.* at 196.

rationale to support the law."[65] "The law ... is constantly based on notions of morality, and if all laws representing essential moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[66]

Texas's statute therefore violates the Equal Protection Clause only if homosexual sodomy is deemed to be a suspect classification. This Court has never before so ruled. In *Romer v. Evans*, upon which petitioners and their *amici* heavily rely, this Court did not apply heightened scrutiny to Amendment 2, the Colorado law in question.[67] Rather, it applied rational basis review. Amendment 2 provided that no government unit in Colorado could "enact, adopt or enforce any statute, regulation, ordinance or policy" that gave "any minority status, quota preferences, protected status or claim of discrimination" based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[68] The Court held that Amendment 2 was irrational because it imposed a status-based classification "not to further a proper legislative end but to make [homosexuals] unequal to everyone else" in their ability to seek protective legislation.[69] The Court also placed emphasis on the complete lack of historical precedent for a law of that nature.[70]

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[65] *Id.*

[66] *Id.*

[67] 517 U.S. at 631-32.

[68] *Id.* at 624.

[69] *Id.* at 635.

[70] *Id.* at 633-34.

Unlike Amendment 2, Texas's anti-sodomy statute does not classify on the basis of status or orientation but rather on the basis of behavior that is chosen. Nor does Texas's statute create some unusual impediment to being amended in the future, should the citizens of Texas decide that they no longer want it. Texas's statute does not penalize a person for being attracted to another person of the same sex or for identifying himself or herself as a homosexual. It penalizes the act of sodomy itself, not the inclination to engage in it.

All of the classifications that this Court has recognized as suspect under the Equal Protection Clause pertain to an individual's status — some feature of their personhood that they cannot immediately control. State classifications based on race, national origin, or alienage are subject to strict scrutiny.[71] State classifications based on gender or legitimacy are subject to intermediate scrutiny.[72] But state classifications based on behavior that can be chosen have never been deemed to be subject to heightened review of any type. To do so would be the equivalent of recognizing a new fundamental right. There is no reason for this Court to introduce further doctrinal confusion by starting a parallel track of fundamental rights analysis under the aegis of the Equal Protection Clause of the Fourteenth Amendment.

This Court should save for another day the question whether state discrimination on the basis of sexual orientation, as opposed to sexual activity, is subject to

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[71] *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Plyler v. Doe*, 457 U.S. 202 (1982).

[72] *United States v. Virginia*, 518 U.S. 515 (1996); *Clark v. Jeter*, 486 U.S. 456 (1988).

heightened scrutiny under the Equal Protection Clause. A ruling on that question might have implications not just for the anti-sodomy statutes of Texas and *amici*, but also for laws that prohibit same-sex marriages and laws that permit only heterosexual couples to adopt. The Equal Protection Clause is too blunt an instrument with which to evaluate the constitutionality of the statute at issue in this case.

III. Recognizing a Fundamental Constitutional Right to Engage in Homosexual Sodomy Will Damage the Legitimacy of this Court and Enshrine a Dangerously Expansive Concept of Individual Freedom.

Contrary to the implication of petitioners and their *amici*, the question whether homosexual sodomy is a fundamental right should not be resolved by perusing the latest public opinion poll (which might in all events militate against recognition of the right). Rather, the question should be resolved according to whether the right has been historically recognized in this country. Under any disciplined analysis, petitioners and their *amici* cannot meet this test. The freedom to engage in homosexual sodomy is not implicit in the concept of ordered liberty, it has not been historically recognized as a right (to the contrary, it has been historically recognized as a wrong), and it has been explicitly rejected as a fundamental right by this Court in *Bowers v. Hardwick*. To recognize it now as a fundamental right would undermine public respect for the rule of law and would do serious damage to the legitimacy of this Court. It would also create an individual right not limited to homosexual sodomy but covering a variety of dangerous activities that have traditionally been within the police powers of the States.

First, far from supporting its recognition as a fundamental right, the recent trend toward decriminalizing homosexual activity confirms that the asserted right is not historically rooted. It also shows that the legislative process can be trusted to work, at least as far as petitioners are concerned, without judicial intervention. The fact that some States, like *amici*, have not gone along with the trend is simply an example of how this country's federalist system works. Different States have different views on the issue. Allowing laws in some States to create a constitutional right that overrides the laws of other States is a perverse theory of constitutional jurisprudence. If the trend were to reverse, would the constitutional right cease to exist? Likely the question would never have to be answered, because reversing the trend would require the States to legislate in defiance of the newly-minted constitutional right. This theory thus essentially operates as a one-way ratchet in favor of liberalism. It forces uniformity on a system of governance that was deliberately designed to ameliorate social conflict by permitting diversity and experimentation among the various States.[73]

Second, "th[is] Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[74] Yet petitioners ask this Court to discard the historical analysis it has traditionally employed in determining

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[73] *Harmelin v. Michigan*, 510 U.S. 957, 990 (1991) ("Diversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system") (Scalia, J., concurring, joined by Rehnquist, C.J.).

[74] *Planned Parenthood*, 505 U.S. at 866 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

the existence of non-textual due process rights, and they ask this Court to overrule a precedent directly on point without any of the traditional justifications for departing from the doctrine of stare decisis. Accepting petitioners' invitation will take this Court perilously down the path toward permanently ensconcing itself as the final arbiter of the *kulturkampf* that is currently being waged over such sensitive and divisive social issues as abortion, sexual freedom, gender identity, the definition of the family, adoption of children, euthanasia, stem cell research, human cloning, and so forth. If *Roe v. Wade* and its progeny have taught one lesson, it is that judicial attempts to resolve social disputes of this nature do not have a calming and stabilizing effect on our society. The people of this Nation do not regard as final and authoritative the rulings of this Court that stray afield from the text and history of the Constitution or statute at issue. Rather, they begin to regard the Court as just one more political branch, and they shift their political energies to changing the composition of the Court and to lobbying the Court through public demonstrations and media exhortations to "do the right thing." Tragically lost in the furor over who wins what social dispute is a public understanding of and respect for the rule of law, which is supposed to transcend ideology and shifting political fancies and is supposed to inspire reverence for and confidence in the legitimacy of our government.

In *Marbury v. Madison*,[75] Chief Justice Marshall premised this Court's power of judicial review on the irrefutable principles that the Court had an obligation to apply law to decide the case at hand and that a

[75] 5 U.S. (1 Cranch) 137 (1803).

written Constitution was the highest law of the land.[76] "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[77] Axiomatic to this seemingly aggressive assertion of the judicial role was that the courts would treat the written Constitution as *law* — as an objective, transcendent, binding force, composed of discernible rules that are applied consistently from case to case and that are bound together by logic and reason. Modern legal realism and critical legal theory notwithstanding, the written Constitution is not a malleable substance that can be deconstructed to the point that it lacks all meaningful content, and then reconstructed to conform to the will of the magistrate or official who is responsible to apply the law to the case at hand. If it could be, it would no longer be law.

Law cannot change from case to case according to the wishes of the judges and litigants. Stare decisis allows for exceptions, to be sure, for the law can never be static; but the exceptions must remain exceptions for the law to remain law. None of the conditions that this Court has recognized for departing from the doctrine of stare decisis apply to this case. *Bowers v. Hardwick* has not proven unworkable; the States and the people who live in those States have relied upon *Hardwick* by enacting anti-sodomy legislation; and the "doctrinal footings" of *Hardwick* have not been eroded.[78] If anything, in the fifteen years since *Hardwick*, this Court has cut back on its definition of

[76] *Id.* at 177.

[77] *Id.*

[78] *See Planned Parenthood*, 505 U.S. at 854-61 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (discussing and applying principles of stare decisis to *Roe v. Wade*).

the non-textual right to privacy. In *Planned Parenthood v. Casey*, the Court affirmed the central holding of *Roe v. Wade* but permitted the States to take greater steps to protect the life of the unborn child than it had before. And in *Washington v. Glucksberg*, the Court refused to expand the right to privacy to encompass the right to die with the assistance of a physician. Nothing in these decisions augured an expansion of the right to privacy to include extramarital sexual activity of any sort.

Overruling *Bowers v. Hardwick* under pressure from those who dislike Texas's anti-sodomy statute or who are impatient with the legislative process will cause many to assume that "justifiable reexamination of principle ha[s] given way to drives for particular results in the short term."[79] The overruling would come at the possible "cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."[80] "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[81] As noted, judicial review was premised on the supremacy of the *written* Constitution. While this Nation has accepted the existence of certain non-textual constitutional rights in the Civil War Amendments, it has done so only because this Court has taken care to articulate those rights with specificity and to ensure

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[79] *Planned Parenthood*, 505 U.S. at 866 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[80] *Id.* at 869 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[81] *Hardwick*, 478 U.S. at 194.

that the rights were firmly grounded in this Nation's traditions. The sexual revolution that transpired in the 1960s is insufficient warrant to read into the Constitution a whole new set of "fundamental" rights.

Third and finally, the right that petitioners advocate is so expansively defined that it will inevitably cover a variety of supposedly consensual adult activity that has always been considered to be within the traditional police power of the States. "Among the liberties protected by the Constitution," petitioners claim (Br. 10), "is the right of an adult to make choices about whether and in what manner to engage in private consensual sexual intimacy with another adult, including one of the same sex." According to petitioners (Br. 8, 12-13), "[o]ne's sexual orientation, the choice of one's partner, and whether and how to connect sexually are profound attributes of personhood where compulsion by the State is anathema to liberty." The scope of these claimed rights is breathtaking.

It should be noted, again, that the Texas statute in question does not criminalize petitioners' sexual *orientation*, which may or may not be a matter of choice and thus may arguably be protected from state discrimination by the Equal Protection Clause of the Fourteenth Amendment. Rather, the Texas anti-sodomy statute criminalizes petitioners' sexual *activity*, which is indisputably a matter of choice. Petitioners' protestations to the contrary notwithstanding, a constitutional right that protects "the choice of one's partner" and "whether and how to connect sexually" must logically extend to activities like prostitution, adultery, necrophilia, bestiality, possession of child pornography, and even incest and pedophilia (if the child should credibly claim to be "willing"). For all

intents and purposes, petitioners seek to enshrine as the defining tenet of modern constitutional jurisprudence the sophomoric libertarian mantra from the musical "Hair": "be free, be whatever you are, do whatever you want to do, just as long as you don't hurt anybody."[82] Bracketing for the moment the dubious proposition that any human behavior is purely self-affecting, suffice it to say that so expansive and undisciplined an interpretation of the Fourteenth Amendment would constitute a radical departure from the historical analysis that this Court has always employed in its fundamental rights jurisprudence. It would embrace the very principle rejected by this Court in *Roe v. Wade*, that "one has an unlimited right to do with one's body as one pleases."[83] And it would ignore this Court's admonition in *Glucksberg* that the Fourteenth Amendment does not protect "any and all important, intimate, and personal decisions."[84]

Contrary to the cliché so tritely tossed about in freshman poli-sci courses, the States can and must legislate morality.[85] John Stuart Mill is not a founding father.[86] "Every society in civilized time . . . has

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[82] Gerome Ragni & James Rado, *My Conviction*, on *Hair: The American Tribal Love-Rock Musical — The Original Broadway Cast Recording* (RCA Victor 1968) (transcribed by David Pirmann, 1993).

[83] 410 U.S. at 154.

[84] 521 U.S. at 725, 727-28.

[85] Aristotle, *Nicomachean Ethics* bk. 2, ch. 1, ¶ 3 (W.D. Ross trans., 1908) ("for legislators make the citizens good by forming habits in them, and this is the wish of every legislator, and those who do not effect it miss their mark, and it is in this that a good constitution differs from a bad one").

[86] *Cf.* John Stuart Mill, *On Liberty* ch. 1, ¶ 9 (1869) ("the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent

traditionally concerned itself with the moral soundness of its people."[87] The mark of a free society is not just the right of the individual "to define [his or her] own concept of existence . . . and of the mystery of human life."[88] It is also the right of the individual to join with other individuals and form communities that define and order themselves according to shared beliefs. Human beings are by their nature social creatures, with concerns for the physical and moral welfare of others besides themselves. And "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."[89]

Even legislation that is largely symbolic and infrequently enforced (due to other salutary checks on government power, like the Fourth Amendment) has significant pedagogical value. Laws teach people what they should and should not do, based on the experiences of their elders. The States should not be required to accept, as a matter of constitutional doctrine, that homosexual activity is harmless and does not expose both the individual and the public to deleterious spiritual and physical consequences. Those who object to traditional attitudes about homosexual

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harm to others"); *Commonwealth v. Bonadio*, 415 A.2d 47, 50-51 (Pa. 1980) (quoting Mill in concluding that Pennsylvania's anti-sodomy statute violates equal protection).

[87] *Poe v. Ullman*, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).

[88] *Planned Parenthood*, 505 U.S. at 852 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[89] *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., concurring).

conduct should take their case to the legislatures of the States, where the views and experiences of all citizens can be considered and shaped into a consensus policy. When the text and history of the Constitution is silent about the existence of a particular right, the legislature is the proper place for recognition of the new right. The courtroom is not.

CONCLUSION

For the foregoing reasons, the judgment of the Fourteenth Court of Appeals of Texas should be affirmed.

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